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Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83

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FEDERAL ACKNOWLEDGMENT OF AMERICAN INDIAN TRIBES: AUTHORITY, JUDICIAL INTERPOSITION, AND 25 C.F.R. § 83

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I. Background

One of the numerous intersections between administrative law and Indian law[1] is found in the *Code of Federal Regulations* at 25 C.F.R. § 83, titled "Procedures for Establishing That an American Indian Group Exists as an Indian Tribe."[2] This caption's terms of Indian "tribe" and Indian "group," both explained in the definitions for 25 C.F.R. § 83,[3] subtly understate both the profound difference in legal status between federally acknowledged[4] and unacknowledged Indian polities and the exacting yet pliant administrative processes by which the latter may become the former. The following is an examination of the previously unsettled but now gradual settling process by which

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1. There is some disagreement in the legal community as to whether a discrete, circumscribed category of "Indian law" actually exists. At best the view that there is no Indian law is semantical polemics; at worst it is unreasoned. Notwithstanding the "seamless web" of the law, it is pragmatically necessary, for convenience's sake, to cite and refer to as Indian law the tremendous corpus of congressional legislation, case law, executive orders, treaties, federal regulations, etc., which since the 1770s has dealt with Indians and U.S.-Indian relations. *See generally* DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW (2d ed. 1986); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942); *id.* (1982 ed.). See also the seven volumes of CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904-70), issues of the *Indian Law Reporter* and the *American Indian Law Review*, and West Digest's extensive keynote category under "Indians."

2. 25 C.F.R. § 83 (1982) (originally promulgated as 25 C.F.R. § 54 (1978)).

3. "'Indian tribe' also referred to herein as 'tribe,' means any Indian group within the continental United States that the Secretary of the Interior acknowledges to be an Indian tribe." 25 C.F.R. § 83.1(f) (1991).

"'Indian group' or 'group' means any Indian aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe." *Id.* § 83.1(g).

4. The terms "acknowledge" and "acknowledgment" are often used interchangeably with "recognize" and "recognition." Indeed, even the drafters of 25 C.F.R. § 83 used the terms — perhaps absentmindedly — interchangeably. *See, e.g., id.* § 83.11(a). For consistency, "acknowledge" and "acknowledgment" will be used exclusively here, since these terms more accurately reflect the ethnohistorical reality of the United States' acknowledging the existence of an extant and continuously surviving American Indian polity.

Congress, the federal judiciary, and the United States Department of the Interior (DOI), or specifically its Bureau of Indian Affairs (BIA), have either assumed or relinquished responsibility for deciding whether an unacknowledged American Indian group shall be acknowledged. The acknowledgment establishes a special bilateral government-to-government relationship between the tribal government and the United States. This status entitles the tribe to a variety of services and benefits, which are provided exclusively to American Indian tribes.

Among the many small oddities found in the history of United States-Indian relations is that not until 1979, fully 157 years after the establishment of the BIA in 1822, was there a comprehensive list of exactly which Indian tribes are federally acknowledged and by exclusion from that list which Indian groups are not.[5] The concept of federal acknowledgment of Indian tribes can be traced from its inchoate beginnings in American history when the major and formative documents of American law were being drafted, notably the Articles of Confederation, the Northwest Ordinance, and the Constitution.[6] At that time the difficult questions of tribal or Indian identity were as yet unformulated, because of the relatively simple and clear ethnic distinctions as to whom or what group was Indian. Moreover, a tradition of treating Indian tribes as sovereignties — curiously coexisting with the antithetical policy of conquest and genocide — had been engendered and followed by the early colonial powers in North America, and had influenced the new Americans in their relations with Indian tribes.[7] No definitions of "Indian" or "tribe" existed in these

5. 44 Fed. Reg. 7235 (1979). There had been some earlier lists created by the BIA to determine which tribes were under the "wardship" of the United States or which were on reservation lands. The most notable of these early lists is found in DEPARTMENT OF THE INTERIOR, CENSUS OFFICE, REPORT ON INDIANS TAXED AND INDIANS NOT TAXED IN THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, at 34-43 (1894). Another notable list was that used by Commissioner John Collier in 1934 following enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-497 (1988)) (Wheeler-Howard Act), delineating which tribes were eligible to vote to accept or reject reorganization. Another list compiled in 1952, though not by the BIA, is found in *Report With Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs*, H.R. REP. No. 2503, 82d Cong., 2d Sess. (1952). *See* H.R. RES. 698, 82d Cong., 2d Sess. 1040-42 (1952). However, the 1979 list was the first conscious, explicit delineation of federally acknowledged Indian tribes as such, and was in fact mandated by the newly promulgated 25 C.F.R. § 83. *See* 25 C.F.R. § 83.6(b) (1982).

6. *See* ARTICLES OF CONFEDERATION art. IX (Nov. 15, 1777); An Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786) *in* 31 JOURNALS OF THE CONTINENTAL CONGRESS 490-93 (1823); Northwest Ordinance, Act of July 13, 1789, ch. 8, art. III, 1 Stat. 50; U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, DOCUMENTS OF UNITED STATES INDIAN POLICY 1-17 (Francis P. Prucha ed. 1975).

7. Easily the best and most comprehensive collection of these colonial documents regarding treaties and relations with Indian tribes is found in ALLEN T. VAUGHAN,

early American documents, nor in a series of six trade or non-intercourse laws enacted by Congress from 1790 to 1802, the sixth and last enacted in 1834.[8] Yet these laws were enacted at a time when considerable dislocation, assimilation, and cultural disruption had already ravaged the Atlantic seaboard tribes. Hence, clear and easy distinctions between tribes and aggregations of assimilated Indian descendants in the East were beginning to be more difficult.

The task of tracing the origins and development of the concept of federal acknowledgment or recognition from this period is replete with terminological problems. The potential for misunderstandings is significant owing to the double entendre of the term "recognition." The terms "wardship" and "guardianship" are common precursors to recognition in the early government documents. The term "recognition" has been used in two distinct senses relative to Indian tribes: (1) in the *cognitive* sense, i.e., that federal officials simply "know" or "realize" that an Indian tribe exists, and (2) sometime later, in the *jurisdictional* sense, i.e., that the federal government formally acknowledges a tribe's existence as a "domestic dependent nation" with tribal sovereignty and deals with the tribe in a special relationship on a government-to-government basis. There appears to be no exact moment when the jurisdictional sense superseded the cognitive; the distinction was formulated gradually over time.[9]

Though congressional enactments tended to leave "Indian" and "tribe" undefined until the latter half of the nineteenth century, the courts were grappling with the definitions much earlier. The issue was not addressed in *Cherokee Nation v. Georgia*[10] or *Worcester v. Georgia*[11]

EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789, at 1-20 (1984); *see also* HOWARD H. PECKHAM & CHARLES GIBSON, ATTITUDES OF COLONIAL POWERS TOWARD THE AMERICAN INDIAN (1969).

8. The original "Indian Trade and Intercourse Act" was amended and reenacted five times, totalling six separate enactments. They were, in order, Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, § 12, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, § 12, 2 Stat. 139. The sixth and final enactment was June 30, 1834, ch. 161, § 12, 4 Stat. 729 (current version at 25 U.S.C. § 177 (1988)).

9. For a comprehensive treatment of this area, see William W. Quinn, Jr., *Federal Acknowlegement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEG. HIST. 331 (1990).

10. 30 U.S. (5 Pet.) 1 (1831).

11. 31 U.S. (6 Pet.) 515 (1832). But see the proleptic statement in the concurrence by Justice M'Lean in *Worcester*: "[W]here small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self government, the laws of the state have been extended over them, for the protection of their persons and property." *Id.* at 580 (M'Lean, J., concurring).

(the Cherokee cases), written by Chief Justice Marshall. However, these landmark opinions set into motion a continuous series of federal court rulings involving Indian tribal sovereignty that have helped define both the legal status and the parameters of autonomy and identity for Indian tribes. Recognition of tribes by the United States, and what criteria determined such recognition, *were* the issues in United States Supreme Court cases approximately thirty years after the Cherokee cases.[12] Although there have been a myriad of cases since the early nineteenth century, federal common law has yet to establish a suitable test to determine tribal status. The cessation of formal treaties between the United States and Indian tribes, which had been among the principal methods for acknowledging tribal entities, occurred in 1871.[13] Added to the rapid disintegration of tribal polities and the accompanying assimilation of Indians nationwide, the need for a cogent and well-defined policy to determine which Indian groups should continue to maintain or, more importantly, *begin* a government-to-government relationship with the United States, became urgent.

Between *United States v. Holliday*[14] and the Wheeler-Howard (Indian Reorganization) Act of 1934 (IRA),[15] the jurisdictional sense of "recognition" finally replaced the cognitive sense. The IRA, and the BIA's implementation of it, did much toward ameliorating the terminological confusion and establishing a standard meaning for the term. Yet, from that point to the mid-1970s, the methods by which those acknowledged tribes attained federal acknowledgment were varied and random. Tribes could still be acknowledged for some purposes and not for others.[16]

It was not until the promulgation of the acknowledgment regulations in 1978 as 25 C.F.R. § 83 that a systematic, uniform method for Indian groups to attain federal acknowledgment as Indian tribes was

12. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865). In the 110-year span from *The Kansas Indians* to promulgation of 25 C.F.R. § 83, numerous federal court decisions gave shape to a rough judicial test to determine tribal status. *See infra* note 28. Consisting more of indicia than criteria, this judicial test was borrowed from the high points of case law dealing with the issue. Among the principal cases in this line during this time span are Williams v. Lee, 358 U.S. 217 (1959); United States v. Candelaria, 271 U.S. 432 (1926); United States v. Sandoval, 231 U.S. 28 (1913); Montoya v. United States, 180 U.S. 261 (1901); United States v. Kagama, 118 U.S. 375 (1886). This judicial test found its most complete formulation in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *cert. denied*, 423 U.S. 1086 (1976) (*Washington I*).

13. Act of Mar. 3, 1871, ch. 20, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1988)).

14. 70 U.S. (3 Wall.) 407 (1865).

15. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-497 (1988)) (Wheeler-Howard Act).

16. Letter from LaFollette Butler, Acting Commissioner of Indian Affairs to Sen. Henry M. Jackson (Jan. 7, 1974), *in* AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE #9 REPORT 306 (1977).

established. The term acknowledgment replaced recognition and signified an exclusively jurisdictional meaning. The tribes, newly acknowledged under 25 C.F.R. § 83, were acknowledged for all purposes.

Though pressure gradually built in the early 1970s for the DOI to effect a system that would acknowledge Indian groups that were unacknowledged, four major events occurring from 1974 to 1977 served as the catalyst for the eventual promulgation of 25 C.F.R. § 83. The first of these events was the creation, work, and final recommendations of Task Force No. 10 of the United States Congress' American Indian Policy Review Commission. The report essentially chastised various departments of the United States for their neglect of "nonrecognized" Indians and made six specific recommendations, including the establishment of a special office using precise "definitional factors" to determine tribal status by petitioning unacknowledged Indian groups.[17]

The remaining three events were federal court cases in which the determination of tribal status stood as the threshold issue. In *United States v. Washington*[18] the Ninth Circuit Court of Appeals held that Indian tribes exercising treaty fishing rights were entitled to half the commercial fish catch in the State of Washington, but limited eligibility to treaty signatories and federally acknowledged tribes. Almost simultaneously the First Circuit Court of appeals decided *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*,[19] where, under the IRA, a federally unacknowledged tribe successfully claimed hundreds of thousands of acres of land in Maine, which had been illegally transferred or ceded to the state. The tribe's success was principally because its status as a tribe was not challenged.

Not surprisingly, in the wake of these decisions the handful of petitions for federal acknowledgment from Indian groups on file at the BIA mushroomed. Perplexed as to how to deal with this deluge of new acknowledgment petitions from nearly forty Indian groups, the DOI instituted an unofficial moratorium on acknowledging tribes until a system could be developed. Caught in the middle of this moratorium, the Stillaguamish Tribe's petition for federal acknowledgment awaited

17. 1 AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 480-83 (Comm. Print 1977). The eventual manifestation of these recommendations was the creation of the Branch of Acknowledgment and Research, Division of Tribal Government Services, BIA, and the enactment of 25 C.F.R. § 83. Several bills were introduced in both the House and Senate in the 95th Congress as enabling legislation for the administrative regulations and office, but none passed. *See infra* note 53.

18. United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (*Washington I*). For a closer examination of the *Washington* cases, and their respective appeals, see Eric Henderson, *United States v. Washington II: Toward a Judicial Standard of Tribal Status*, 24 ARIZ. L. REV. 179 (1982).

19. 528 F.2d 370 (1st Cir.), *aff'g* 388 F. Supp. 649 (D. Me. 1975); *see also* James D. St. Clair & William F. Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91, 96 n.27 (1979).

action by the Secretary until the Tribe, its patience exhausted, sought equitable relief in federal court. In *Stillaguamish Tribe v. Kleppe*[20] the court, describing the delay as "arbitrary and capricious," ordered the DOI to decide on the Stillaguamish petition within thirty days. From that point the DOI placed the creation of acknowledgment regulations at a high priority. Within ten months the DOI published its proposed regulations for acknowledgment of Indian tribes in the *Federal Register*.[21]

Since the institution of 25 C.F.R. § 83 in 1978, those tribes that have been newly acknowledged either through the administrative process or through legislation have been acknowledged for all purposes.[22]

20. Civ. No. 75-1718 (D.D.C. Aug. 24, 1976); *see also* GETCHES & WILKINSON, *supra* note 1, at 250.

21. Proposed regulations were published on June 16, 1977. *See* 42 Fed. Reg. 30,647 (1977). Revised proposed regulations were published on June 1, 1978. *See* 43 Fed. Reg. 23,743 (1978). The period for public comment for the latter proposal closed on July 3, 1978. Throughout this period from June 16, 1977, the amount of consultation and discussion with tribes and other interested parties was almost unprecedented relative to BIA rulemaking, with a total of 400 meetings, hearings, and conversations. The final, revised acknowledgment regulations were published on Sept. 5, 1978. *See* 25 C.F.R. §§ 83.1-.11 (1991).

One must be careful to distinguish at the outset between "acknowledgment" and "restoration" of Indian groups. With regard to the latter, during the "termination" phase of American Indian policy in the 1950s, Congress terminated the government-to-government relationship of several Indian tribes. *See* 2 FRANCIS P. PRUCHA, THE GREAT FATHER 1041-59 (1984). The termination policy subsequently failed. The tribes once terminated have gradually been "restored" to their former legal statuses as federally acknowledged via congressional legislation, since the executive is precluded from acknowledging a congressionally terminated tribe. *See* 25 C.F.R. § 83.3(e) (1982). Congressional bills to restore Indian tribes are typically referred for comment to the BIA, which uses the following informal criteria, each requiring an affirmative finding, to determine whether it will recommend restoration:

> (1) There exists an ongoing, identifiable community of Indians who are members of the formerly recognized tribe or who are their descendants; (2) The tribe is located in the vicinity of the former reservation; (3) The tribe has continued to perform self-governing functions either through elected representatives or in meetings of their general membership; (4) There is widespread use of their aboriginal language, customs, and culture; (5) There has been marked deterioration in their socio-economic conditions since termination; and (6) Their conditions are more severe than in adjacent rural areas or in other comparable areas within the State.

Internal Memorandum, Branch of Tribal Relations, BIA (n.d.) (on file with author).

22. *See, e.g.*, 25 C.F.R. § 83.11(a) (1982).

> Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States. . . .

Id. For an example of the full acknowledgment status for tribes acknowledged by congressional legislation, see *infra* note 30.

Prior to 1978, and beginning as far back as the mid-nineteenth century, tribes were often so designated for specific purposes usually relative to definitions in statutes.[23] Thus, anomalies were created in which Indian tribes could be tribes for some purposes (e.g., depredations or takings claims) but not for others (e.g., the provision of services and benefits to tribes by the United States). Such definitions were typically elaborate. Federal courts made determinations of tribal status when questions of applicability of statutes or eligibility for services arose. The result of a century of such desultory and unfocused judicial rulings absent any cogent or reasonable federal acknowledgment policy created chaos. Intermittently sovereign partial-tribes were tribes under some statutes or common-law tests and not tribes under others or under BIA definitions.[24]

Moreover, creation of such anomalies was not restricted to the courts. The BIA and the Indian Health Service (IHS) consistently provided services to individual Indians and Indian descendants while refusing to recognize or provide services to their respective tribal governments. A glaring example of a meaningless congressionally be-

23. Two of the most notable of these statutes were the Indian Depredations Act of Mar. 3, 1891, 26 Stat. 851, and the Indian Claims Commission Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049. Each makes very general references to "tribe" and "band" requiring further definition by the United States Court of Claims and the Indian Claims Commission as a branch of that court. *See, e.g.*, Dobbs v. United States, 33 Ct. Cl. 308 (1898); Tully v. United States, 32 Ct. Cl. 1 (1896); Graham v. United States, 30 Ct. Cl. 318 (1895); *see also* Peoria Tribe v. United States, 169 Ct. Cl. 1009 (1965); Nooksack Tribe v. United States, 162 Ct. Cl. 712 (1963); Upper Chehalis Tribe v. United States, 155 F. Supp. 226 (Ct. Cl. 1957); Loyal Creek Band or Group of Creek Indians, 1 Indian Cl. Comm'n 122 (1949).

24. A cursory perusal of RICHARD S. JONES, FEDERAL PROGRAMS OF ASSISTANCE TO AMERICAN INDIANS (Comm. Print 1985) (U.S. Senate Committee on Indian Affairs) will reveal that 50 separate federal agencies provide some services, benefits, or programs to American Indians, and that most agencies have different criteria for eligibility to these entitlements (i.e., Indians or Indian tribes) for "different purposes." Although many agencies now require federal acknowledgment of the tribe or individual membership or enrollment in federally acknowledged tribes for eligibility, many still do not. How those agencies not requiring federal acknowledgment make proper determinations as to who or what entity is eligible, beyond taking claims of "Indian-ness" at face value, is a mystery. Statistics of the United States Census Bureau show that, according to the self-determined racial category on the 1980 decennial census, approximately 600,000 persons not serviced or accounted for as Indians by the BIA chose the "Native American" or "American Indian" category — a 72% increase from the previous decennial census of 1970. Moreover, the author estimates that 10% to 15% of the 126 Indian groups currently petitioning for federal acknowledgment under 25 C.F.R. § 83 are essentially bogus Indian groups, or Indian descendant recruitment organizations, composed of predominantly white persons (who may or may not believe themselves to be Indians or Indian descendants) masquerading as Indians. *See also* GETCHES & WILKINSON, *supra* note 1, at 251-52; *cf.* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

stowed federal acknowledgment is found in the politically motivated Lumbee Indians of North Carolina Act of 1956.[25] This Act gave the Lumbee people federal acknowledgment, but for *no* purpose.[26]

Although fractured statuses of Indian tribes are still present, there has been an increasing tendency in recent years to acknowledge tribes for all purposes. Newly acknowledged tribes now become eligible for the entirety of services and benefits provided to Indian tribes,[27] and this simple "in or out" distinction has created a clean bifurcation between acknowledged Indian tribes and unacknowledged Indian groups. Acknowledgment for all purposes and its attendant access to these entitlements serves as the principal enticement for those Indian groups as yet unacknowledged to petition the United States, through the DOI, for new legal status.

The issue of which branch of government should or is properly authorized to acknowledge American Indian tribes remains unsettled. The recent record seems to be formulating which branch is most appropriate for the acknowledgment determination.

Since the promulgation of 25 C.F.R. § 83, there have been seven federal courts cases that have addressed, to some degree, the issue of tribal existence or federal acknowledgment.[28] The various federal district and appeals courts have split as to whether they had jurisdiction to make such determinations or whether they should defer to the administrative process within the BIA. The latter would be consistent with the doctrine of primary jurisdiction. The courts making their own judicial determinations of tribal existence have used a patchwork case-

25. Act of June 7, 1956, ch. 375, 70 Stat. 254.

26. *Id.* Congress, which gave with one hand by declaring that these people shall "be known and designated as Lumbee Indians of North Carolina," took away with the other: "[N]othing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." 70 Stat. at 255. Subsequent to submitting their documented petition on December 17, 1987, the Lumbees tried once again for congressional acknowledgment. On July 14, 1988, Rep. Rose (D.-N.C.) introduced House Bill 5042, "A Bill to Provide Federal Recognition for the Lumbee Tribe of North Carolina." (A companion bill, Senate Bill 2672, was introduced in the Senate on July 29, 1988, by Sen. Sanford (D-N.C.)). Hearings on the legislation were held before the Committee on Interior and Insular Affairs on August 11, and Assistant Secretary Swimmer opposed the bill on grounds that a documented petition was pending. With no real support, the bill died. *See* H.R. 5042, 100th Cong., 2d Sess. (1988).

27. For a brief description of these entitlements, see William W. Quinn, Jr., *Public Ethnohistory? Or, Writing Tribal Histories at the Bureau of Indian Affairs*, 10 PUB. HISTORIAN 71, 74 (1988).

28. James v. DHS, 824 F.2d 1132 (D.C. Cir. 1987); Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985), *cert. denied sub nom.* Hou Hawaiians v. Hawaii, 474 U.S. 1055 (1986); United States v. Washington, 641 F.2d 1368 (9th Cir. 1981), *cert. denied sub nom.*

law test. The foundation is *Montoya v. United States*;[29] *Montoya's* accretions have formed a judicial test of sorts. Congress, in the meantime, has enacted four separate pieces of legislation since 1978 bestowing federal acknowledgment on four new Indian tribes.[30]

II. Authority to Acknowledge Indian Tribes

A. Congressional Authority

It is virtually axiomatic in Indian law that the Congress has "plenary power"[31] concerning Indian affairs. This control over American Indians and their affairs stems predominantly from the so-called "Indian Commerce Clause."[32] The single grant of power awarded Congress by the United States Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[33] This authority is not unlimited, however, since it is subject both to constitutional constraints and judicial review. Congressional authority to acknowledge Indian tribes was specifically

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Duwamish, Samish, Snohomish, Snoqualmie & Steilacoom Indian Tribes v. Washington, 454 U.S. 1143 (1982); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); Sekaquaptewa v. MacDonald, No. Civ. 74-842 PHX EHC (D. Ariz. Dec. 30, 1974); Mohegan Tribe v. Connecticut, No. Civ. H-77-434 MJB (D. Conn. 1977); Cherokee Indians v. United States, No. Civ. C-83-1111-R (M.D.N.C. Jan. 30, 1986) (order dismissing action); Coyote Valley Band of Pomo Indians v. United States, 639 F. Supp. 165 (E.D. Cal. 1986) (whether tribes can call election and reorganize under IRA).

29. 180 U.S. 261 (1901).

> By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design.

Id. at 266; *cf.* Henderson, *supra* note 18, at 184-85.

30. The four Indian tribes congressionally acknowledged since the promulgation of 25 C.F.R. § 83 in 1978 are: the Maliseet Tribe of Maine (Act of Oct. 10, 1980, 94 Stat. 1785); the Cedar City Band of Paiutes in Utah (Act of Apr. 3, 1980, 94 Stat. 317); the Cow Creek Band of Umpquas in Oregon (Act of Dec. 29, 1982, 96 Stat. 1960); and the Mashantucket Pequot Tribe of Connecticut (Act of Oct. 18, 1983, 97 Stat. 851). Technically, the congressional acknowledgment of the Pasqua Yaqui of Arizona falls within this category, as they were acknowledged just two weeks after final publication of 25 C.F.R. § 83 (Act of Sept. 18, 1978, 92 Stat. 712). However, the Yaquis were expressly precluded from administrative acknowledgment by previous legislation, so Congress was their only alternative for federal acknowledgment.

31. *See* COHEN, *supra* note 24, at 217 ("[T]he cases have described Congress' power over Indian affairs as 'plenary.'"). The federal court cases circumscribing this power are too numerous to list, but an admirable job was done by Cohen. *Id.* at 211-14.

32. U.S. CONST. art. I, § 8, cl. 3.

33. *Id.*

tempered by judicial decision in *United States v. Sandoval*.[34] There, the court announced the rather self-evident principle that even Congress may not confer federal acknowledgment as an Indian tribe upon any aggregation of people who claim to be Indian.[35] As straightforward as this principle seems, it is not clear in the event the legislative acknowledgment is challenged what standards should be used by Congress or by the courts in determining which Indian groups are "acknowledgeable."[36]

Concerning federal acknowledgment in light of the *Sandoval* decision, the United States Supreme Court announced a second limitation of Congress's plenary power over Indians in *Delaware Tribal Business Committee v. Weeks*.[37] The Court held that exercises of Congress' plenary power over Indians must be "rationally related" to the purposes of the government-to-government relationship.[38] However, as L.R. Weatherhead has observed, "In fact there is no case in which a congressional judgment or enactment has been overturned on the basis of the above limitations."[39] Congress' plenary power over Indian affairs and Indian tribes regarding federal acknowledgment of those tribes appears in fact to be "plenary," notwithstanding the judicially

34. 231 U.S. 28 (1913).

35. "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . ." *Id.* at 46.

36. *See* COHEN, *supra* note 24, at 5 nn.16 & 17. It may well have been such uncertainty that precipitated Congress's unique and anomalous "acknowledgment" of the Lumbees in 1956 (see *supra* note 26), and which caused the desuetude of Senate Bill 1142, "A Bill to Provide Federal Recognition of the Mowa Band of Choctaw Indians of Alabama," introduced on May 6, 1987 by Sen. Shelby (D.-Ala.) in the 100th Cong., 1st Sess., 133 CONG. REC. 6096-97 (1987).

37. 430 U.S. 73, *reh'g denied*, 431 U.S. 960 (1977); *cf.* L.R. Weatherhead, *What Is an "Indian Tribe"? — The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 3-4 (1980).

38. *Weeks*, 430 U.S. at 84.

39. Weatherhead, *supra* note 37, at 4. Although the judiciary has never denounced a congressional acknowledgment, the executive has. In 1983 President Reagan vetoed Senate Bill 366, the first bill that would have federally acknowledged the Mashantucket or Western Pequot Tribe in Connecticut. The rationale used by the President is not dissimilar from that governing primary jurisdiction cases between executive agencies and the courts. In his veto message of July 5, 1983, the President enunciated three reasons why he vetoed the bill, the third of which was that

> the Tribe may not meet the standard requirements for Federal recognition . . . The government to government relationship between the Western Pequot Tribe and the Federal Government that would be established by this bill is not warranted at this time, pending further study by Interior. Extending Federal recognition to the tribe would bypass the Department of the Interior's administrative procedures that apply a consistent set of eligibility standards in determining whether or not Federal recognition should be extended to Indian groups.

129 CONG. REC. S4155 (1983).

imposed limitations on its power and the threat of judicial voidance of a congressional acknowledgment of a group subsequently shown not to be culturally, biologically, and politically Indian. Though there may be little dispute about Congress' plenary power in this area, the issue of the delegation of that power to the Executive Branch does raise new questions.

B. Executive or Administrative Authority

The administrative law rubric of "subordinate delegation" falls under the dual authority of the Secretary of the Interior (Secretary) to (1) acknowledge American Indian tribes and (2) to promulgate rules pursuant to that authority in order to determine which Indian groups should be acknowledged as tribes. This authority, as stated in 25 C.F.R. § 83, rests initially upon 5 U.S.C. § 301,[40] which provides simply that "[t]he head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."[41] This statute arguably failed to provide the Secretary with the authority to promulgate 25 C.F.R. § 83, as those rules are predominantly substantive and interpretive. The type of rules under the rulemaking power authorized by 5 U.S.C. § 301 appear to be housekeeping, with some procedural.

The second grant of authority Congress delegated to the Secretary to acknowledge Indian tribes cited in 25 C.F.R. § 83, is found in 25 U.S.C. §§ 2, 9.[42] Section 2 involves a congressionally mandated subdelegation of authority from the Secretary of the Interior to the Commissioner[43] of Indian Affairs, under which the Commissioner shall

40. The codified statute alone is cited under "Authority" in the *Code of Federal Regulations*. Congress gave this power to federal agencies by the Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 379.

41. 5 U.S.C. § 301 (1988).

42. 25 U.S.C. § 2 (1988) is otherwise section 463 of the *Revised Statutes*, derived from the Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, and the Act of July 27, 1868, ch. 259, § 1, 15 Stat. 228. Almost as old, 25 U.S.C. § 9 is otherwise section 465 of the *Revised Statutes* and derived from the Act of June 30, 1834, ch. 162, § 17, 4 Stat. 738. *See* 25 U.S.C. § 9 (1988). A comprehensive legal analysis of these was made by Solicitor Nathan Margold in 1935. *See* 1 U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR, INDIAN AFFAIRS 531-37 (1974).

43. The post of commissioner of Indian Affairs no longer exists. Yielding to the pressure of certain Indian political action committees whose members felt that a commissioner was not equal in stature to the other assistant secretaries of the Interior as separate agency heads, DOI officials changed the position to "Assistant Secretary of the Interior—Indian Affairs" in the late 1970s, thus ending an established and hoary tradition of more than 150 years. *See* ROBERT M. KVASNICKA & HERMAN J. VIOLA, THE COMMISSIONERS OF INDIAN AFFAIRS, 1824-1977, at xvi (1979).

"agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations."[44] Similarly, this statute — essentially a grant of managerial authority — would arguably not authorize the Secretary or Commissioner to establish a perpetual government-to-government relationship via federal acknowledgment with an Indian group not already under the Department's aegis.

Section 9 delegates legislative authority to the President and authorizes "[t]he President [to] prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." Though this section is unquestionably an authorization from Congress for the President to make rules regarding Indian affairs, and though under the doctrine of subdelegation the President may give that authority to either the Secretary or Commissioner, the grant expressly limits this rulemaking authority to effecting the provisions of existing congressional acts.[45] Thus, arguably the introduction of a new Indian tribe — absent any enabling legislation acknowledging such tribe — into the number already serviced by the DOI would not be authorized under this statute alone.

The last authority cited in 25 C.F.R. § 83 are chapters 1 and 2 of part 230 of DOI's Departmental Manual.[46] The chapters further delegate the Assistant Secretary of Indian Affairs' (formerly the Commissioner's) general authority to regulate Indian affairs to his deputies.

Any challenger to DOI's authority acknowledging Indian tribes under 25 C.F.R. § 83 would discover a lack of meaningful standards and the absence of an "intelligible principle" in the delegations cited in the enabling legislation and its codified sections. To date no such challenges have been made. However, not only have there been threats

44. 25 U.S.C. § 2 (1988).

45. The two most commonly cited congressional acts pertaining to delegation and authority to regulate and supervise Indian affairs are similarly broad and vague. *See* Act of Nov. 2, 1921, ch. 115, 42 Stat. 408 (codified at 25 U.S.C. § 13 (1988)) (Snyder Act); Act of Apr. 16, 1934, ch. 147, § 1, 48 Stat. 596 (codified at 25 U.S.C. § 452 (1988)) (Johnson-O'Malley Act). Neither of these statutes has any clear standards or definitions relative to acknowledgment of Indian tribes, but rather are very broad grants of authority to *provide* for existing Indian tribes. Therefore, if the reliance on 25 U.S.C. § 9 in 25 C.F.R. § 83 anticipates the Snyder and Johnson-O'Malley Acts, the result is vagueness supported by other vagueness.

46. 230 DM 1.1 to 1.4 (Feb. 9, 1987) (#2729) (replacing previous version of July 3, 1986 (#2689)); 230 DM 2.1, 2.2 (Feb. 9, 1987) (#2729) (new). Thus, the completed line of subordinate delegation and subdelegation putatively to acknowledge Indian tribes begins in Congress and flows through the President, the Secretary of the Interior and Assistant Secretary of the Interior, to the Deputy Assistant Secretary of the Interior — Indian Affairs, where it ceases. *See also* 2 U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR, INDIAN AFFAIRS 1211 (1974).

to deny the validity of DOI's authority to federally acknowledge Indian tribes, but certain parties believe that the presumption should be that petitioning Indian groups are tribes and the DOI has the burden of proving they are not tribes.[47] The current presumption is that Indian groups are not tribes and the DOI has the burden of proving they are tribes.

The consensus of the commentators on administrative law issues of delegation, meaningful standards or intelligible principles with delegation, and the nondelegation doctrine indicate — though none addresses the question directly — that the Secretary has the authority both to acknowledge Indian tribes and to promulgate regulations to effect such acknowledgments. This consensus is in turn reflected in the DOI's policy statements and memoranda, especially those from the Office of the Solicitor advocating the Secretary's authority. The most concise, and simultaneously the most comprehensive, statement on these issues is found in Kenneth Davis' *Administrative Law Treatise*:

> Congress may and does lawfully delegate legislative power to administrative agencies. The Supreme Court has *said* many times — more than a hundred — that standards are required, but it has often *held* that standards are not required. The Supreme Court throughout the twentieth century has upheld congressional delegations without standards, and except for two 1935 decisions, it has never held unconstitutional any delegation to an administrative agency. Since 1935 the nondelegation doctrine has had no reality in the holdings, although remnants of the doctrine persist in judicial verbiage.[48]

47. *See* Terry Anderson, *Federal Recognition: The Vicious Myth*, 4 AM. INDIAN J. 7, 19 (1978) ("[T]he idea that the federal government can exclude tribes from recognition is false. The simple fact is that there is no basis in law for the federal government to exclude certain tribes from the benefits of the federal trust responsibility to Indians because they lack the ill-defined status of federal recognition."); *cf.* 1 AMERICAN POLICY REVIEW COMMISSION, FINAL REPORT 461 (1977) ("There is no legitimate foundation for denying Indian identification to any tribe or community. The BIA has no authority to refuse services to any member of the Indian population."); *id.* at 479 ("Every Indian tribal group which seeks recognition must be recognized; every [BIA] determination that a group is not an Indian tribal group must be justified. . . ."). The apodictic tone of these assertions indicates a naive assumption that all claims to being Indian or an Indian tribe are genuine, or that such determinations are simple to make, with polar "black or white" alternatives determinable on prima facie evidence.

48. 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.1, at 149-50 (2d ed. 1979). The "two 1935 decisions" are, of course, Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935) ("[The Recovery Act] supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied [and] sets up no standards. . . This is delegation running riot."), and Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) ("[C]ongress has declared no policy,

Though written a decade ago, this statement still describes the current state of the law.[49]

Notwithstanding the current impuissance of the nondelegation doctrine in federal law, or alternatively, assuming that the Rehnquist Court readopts the meaningful standards requirement for congressional delegations of legislative authority, one might legitimately ask where in the statutes cited as authority in 25 C.F.R. § 83, *viz.*, 5 U.S.C. § 301 and 25 U.S.C. §§ 2, 9, are to be found any meaningful standards or any intelligible principle[50] authorizing the Secretary of the Interior to create a quasi-sovereign political entity using a highly complex set of legal and ethnohistorical criteria which he himself promulgated under color of this authority.

The question is answered variously by DOI officials and other commentators. The issue came to fruition at the DOI in 1974 during the decision-making process concerning the Stillaguamish Tribe's petition for federal acknowledgment; the determination involved whether the Secretary's federal acknowledgment of an Indian group by administrative fiat would be *ultra vires*. In August 1974 the Associate Solicitor — Indian Affairs wrote a memorandum to the Solicitor titled "Secretary's Authority to Extend Federal Recognition to Indian

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has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions. . . ."). *Cf.* BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 79 (3d. ed. 1988) ("Suffice it to say that most federal agencies are vested with powers of subordinate legislation.").

49. Three major cases have been decided — or affirmed — in recent years by the Supreme Court concerning standards in delegation and the nondelegation doctrine. Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 475 U.S. 714 (1986); American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980). Though none held the enabling legislation unconstitutional for lack of meaningful standards, Justice Rehnquist argued that "[w]e ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority . . ." *Id.* at 686 (Rehnquist, J., concurring); *see also* KENNETH C. DAVIS, 1982 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE, § 3:1, at 11-14 (1982).

50. The "intelligible principle" concept appears to have been a sort of second-string back-up to the more tangible "meaningful standards" judicial test. Presumably realizing that Congress, generally lacking specialist expertise, or perhaps subject to the compromise syndrome, could not always produce precise legislation to cover complex issues with meaningful standards, the Court instituted the intelligible principle, which first appeared as such in J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). The Court insisted that legislative delegations, in the absence of meaningful standards, should have at the least an intelligible principle to guide administrative agencies in the application of the law. It would appear that today the intelligible principle is just as moribund as the meaningful standard relative to the nondelegation doctrine. *Id.* at 409.

Tribes."[51] In the memorandum the Associate Solicitor relied on dicta in *Holliday* to establish not the Secretary's authority but the Court's acquiescence in following the executive when tribal status is in dispute and on a tautological comment by the Secretary regarding some Burns Paiute Indian Colony legislation, which took land in trust stating that this group was acknowledged when the Commissioner approved its constitution.[52] Although its title is tantalizing, this memorandum contained exiguous definitive data about the Secretary's authority to acknowledge Indian tribes.

This nebulous basis for and exercise of authority by the Secretary to acknowledge Indian tribes was reflected three years later in a letter to Congress from the Assistant Secretary — Indian Affairs. The Assistant Secretary responded negatively to proposed legislation that would establish both regulations and an office for federal acknowledgment.[53] In a somewhat equivocal statement, the Assistant Secretary declared that "[w]hile we believe that the Secretary has that authority [to acknowledge Indian tribes], under 5 U.S.C. § 301 and sections 463 and 465 of the Revised Statutes (25 U.S.C. §§ 2, 9), there is no specific legislative authorization."[54] Moreover, while the DOI *did* object to these bills, which would effectively preempt the authority of the Secretary, "[The DOI] would *not* object to a bill which specifically confirms the Secretary of the Interior's authority to recognize additional Indian groups."[55] This last statement is little more than a plea for insurance, in case the Courts subsequently determined that the Secretary is without such authority. Such a bill has never been enacted, or even introduced.

Most of these memoranda and building-block attempts at establishing the Secretary's authority to acknowledge Indian tribes by exhuming obscure legal precedents skirted the principal reason for such authority — perhaps because the reason was too obvious, or perhaps because it

51. Memorandum from Reid P. Chambers, Associate Solicitor for Indian Affairs, Office of the Solicitor, U.S. Dep't of the Interior, to Solicitor (Aug. 20, 1974) (on file with the U.S. Department of the Interior, Office of the Solicitor); *see also* Act of Oct. 30, 1972, Pub. L. No. 92-488, 86 Stat. 806.

52. *Id.*

53. In an apparent response to recommendations of Task Force No. 10 of the AIPRC (see *supra* note 17), various bills were introduced in both the Senate (Senate Bill 2375) and the House (House Bill 12,996 and House Bill 13,773) in the second session of the 95th Congress. Hearings on these bills were held, and printed, on both sides. Because of an apparent race between Congress and the Executive to establish acknowledgment regulations and the competition which thereby ensued, the DOI, not surprisingly, refused to support the legislation. *See* S. 2375, 95th Cong., 2d Sess. (1978); H.R. 13773, 95th Cong., 2d Sess. (1978); H.R. 12996, 95th Cong., 2d Sess. (1978).

54. Letter from Rick V. Lavis, Acting Assistant Secretary, Indian Affairs, U.S. Dep't of the Interior, to Hon. Morris Udall (Aug. 8, 1978), *in Hearing Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. 14 (1979).

was perceived to be insufficiently juridical. The simple fact is the Secretary has this authority because he has always exercised it, irrespective of proper delegation from Congress. This circular logic is even alluded to in the Associate Solicitor's memorandum describing the "significance" of the Secretary's statement concerning the Burns Paiute Indian Colony legislation: "[T]he Secretary has previously recognized and exercised the authority of the Executive Branch to extend recognition to Indian tribes and . . . Congress has been made aware that the Secretary believes that he has the authority to recognize tribes."[56] If the Associate Solicitor had sought authority for this legal proposition, he would have found a United States Supreme Court decision directly on point. In ruling on the extent of the authority of the Secretary of the Interior where Congress had been silent, the Court in *United States v. Midwest Oil Co.* held:

> Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation.[57]

This administrative exercise of power is not a case of the Secretary expropriating or usurping the plenary power of Congress to authorize the federal acknowledgment of Indian tribes. Rather, the issue is a matter of the Secretary's historically exercising such authority where a vacuum of responsibility existed over decades, resulting in a gradual and unchallenged accretion of this authority. Were the doctrine of laches to apply to the exercise of authority under the separation of powers, Congress would thus have forfeited its exclusive prerogative to acknowledge Indian tribes.

56. Chambers, *supra* note 51, at 3; *see also* COHEN, *supra* note 24, at 16 ("[I]n 1819 the federal government began to provide special services to Indians through general federal statutes. Most . . . are rendered under general congressional enactments, which often fail to define with any precision the limits of the intended service population."); Anderson, *supra* note 47, at 12 ("It is apparent that administrative authority for recognition of previously unrecognized tribes does exist and has been exercised."); *cf.* United States v. Mazurie, 419 U.S. 544, 556-57 (1975) ("Those limitations [on congressional delegations] are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." (citations omitted)).

57. United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915).

In the final analysis, unless the United States Supreme Court effects a startling reversal of direction and delivers a *coup de main* to stare decisis relative to the nondelegation doctrine,[58] the aggregate of secretarial tradition *plus* the broad authority cited in 25 C.F.R. § 83 allowing administrative federal acknowledgment of Indian tribes is probably enough to establish the Secretary's authority. So established, and under the current state of the law on nondelegation in which "[t]he judicial tendency is to uphold virtually all delegations — even where the standards contained are so broad as to be illusory,"[59] any challenge in federal court to the Secretary's authority to federally acknowledge Indian tribes and promulgate regulations to that end would almost certainly fail.

C. Administrative Procedures for Federal Acknowledgment of Indian Tribes

What then are the regulations' criteria used by the Secretary in the discretionary exercise of his authority to confer federal acknowledgment on an Indian tribe? The "basic procedure" is one of ascertaining facts through informal adjudication and ultimately adjudging whether a petitioning Indian group meets the mandatory criteria in the regulations by applying the standards set forth in 25 C.F.R. § 83. In sharp contrast to an adversarial trial-type procedure with all its due process accoutrement, the informal adjudication procedure is very well tailored to the needs of the task. The job requires an evaluation of complex and often ambiguous data and/or issues of ethnohistory, cultural anthropology, and genealogy[60] (and sometimes administrative law).[61]

58. This is by no means beyond possibility. Indeed, one might even regard as prescient the Chief Justice's concurrence in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 662 (1980) and Justice Rehnquist's dissent, joined by the Chief Justice, in American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 542 (1981) calling for the reinstitution of a revised nondelegation doctrine.

59. SCHWARTZ, *supra* note 48, at 117; *cf.* United States v. Washington, 476 F. Supp. 1101, 1103 (W.D. Wash. 1979) (*Washington III*) ("Neither Congress nor the Executive Branch has prescribed any standardized definition for either the term 'Indian' or 'Indian tribe' in terms of the special federal relationships with Indians.") (Finding of Fact #6). One might rebut this finding by pointing to the combination of 25 C.F.R. § 83.1(f) and § 83.7(a)-(g) (1991).

60. 3 DAVIS, *supra* note 48, § 14:4, at 24. For a legal analysis of the scope and requirement of the regulations, see Blackwell & Mehaffey, *American Indians, Trust and Recognition, in* NONRECOGNIZED AMERICAN INDIAN TRIBES: AN HISTORICAL AND LEGAL PERSPECTIVE (Frank W. Porter ed., 1983) (available from the Newberry Library's Center for the History of the American Indian, Chicago, Ill.).

61. *See* Memorandum from the Assistant Solicitor, Branch of Tribal Government and Alaska, to the Deputy to the Assistant Secretary — Indian Affairs (Apr. 3, 1987) ("Issues Pertaining to Acknowledgment of San Juan Southern Paiutes and Relationship of 25 C.F.R. § 83, 83.1(k), 83.3(d), and 83.7(c) and (f)") (six pages) (on file with the Office of the Solicitor, Department of the Interior, Washington, D.C.).

After the proposed regulations were published in the *Federal Register* in 1977, sixty written comments were received from government officials, historians, anthropologists, tribal leaders, petitioning Indian groups, lawyers, and congressional staff members, resulting in the revised proposed regulations which became final in 1978 and now constitute 25 C.F.R. § 83.

For an unacknowledged Indian group to become an acknowledged tribe, the tribe must meet successfully all seven mandatory criteria found specifically in 25 C.F.R. § 83.7 (a)-(g). Such a petitioning group must: (a) establish that it has been identified from historical times to the present on a substantially continuous basis as "American Indian" or "aboriginal"; (b) establish that a substantial portion of the group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area; (c) furnish a statement of facts which establishes that the group has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present; (d) furnish a copy of the group's present governing document, or in the absence of such a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members; (e) furnish a list of all known members based on the group's own defined membership criteria, and show that the membership consists of individuals who have established descendancy from a tribe that existed historically or from historical tribes that combined and functioned as a single autonomous entity; (f) establish that the membership of the group is composed principally of persons who are not members of any other North American Indian tribe; and (g) establish that neither the group nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.[62] Since the burden of proof to substantiate the claim of continuous tribal existence under these criteria rests with the petitioner, voluminous ethnohistorical data are usually submitted by the petitioner and often by parties opposed to federal acknowledgment of the petitioner.[63] Upon

62. Though this is essentially a paraphrase of the relevant criteria in the regulations at 25 C.F.R. §§ 83.7(a)-(g) (1991), it is nonetheless loyal to the Code's wording.

63. Though categorized as "informal adjudication" under the prevailing taxonomy of administrative law procedure, the process can be quite adversarial, sans the typical courtroom *modus operandi*. For example, aggressive opposition was made to the acknowledgment petitions of the Samish and Snohomish by the Tulalip Tribes; to that of the San Juan Southern Paiutes by the Navajo Tribe; to that of the Gay Head Wampanoags by the Gay Head Taxpayer's Association; and to that of the Mohegans by the State of Connecticut. The Tulalip Tribes, Navajo Tribe, and the Gay Head Taxpayer's Association were represented by large law firms in their opposition, and Connecticut

completion of this long and assiduous process by the Secretary's staff, the Secretary will decide, based upon the recommendation, as to whether or not to acknowledge the petitioner as an Indian tribe. Since 1978 the Secretary has acknowledged eight tribes under 25 C.F.R. § 83, but the federal courts have not always acceded to his administrative prerogative to do so.

III. Primary Jurisdiction, Political Question, and Exhaustion

It may be asserted with a relatively high degree of certainty that authority is vested in the Secretary of the Interior to federally acknowledge Indian tribes. The Supreme Court imposes limitations upon the Secretary and the Congress that share their plenary power authority over Indian affairs. Two methods exist by which an unacknowledged Indian group can obtain federal acknowledgment as a tribe: secretarial and congressional. Although this replication or bifurcation is sufficiently enigmatic of itself, the analysis is further complicated by a third element, the ability of the federal courts to confer what amounts to federal acknowledgment upon an unacknowledged Indian group for the purposes of the issue before them.[64] Where this leaves the doctrine of separation of powers is a question that may best be answered by divination.

More germane than which branch of government has the authority to acknowledge Indian tribes and from whence this authority derives, is the issue of which branch *should* decide — to which branch does the decision to acknowledge an Indian tribe rightfully and properly belong? To rephrase the question in succinct administrative law terms,

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by its assistant attorney general. The opposition data and documents submitted by these opposing parties were voluminous (the Connecticut attorney general's being 11 thick volumes), and were nearly all submitted prior to or at the outset of the year-long petition evaluation process.

64. The most salient example of recent judicial determination of tribal status is Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), *aff'g* 388 F. Supp. 649 (D. Me. 1975). The decision states, in pertinent part:

> [T]he trust relationship [between the Tribe and the United States] we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive branch may at later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities. . . .

Id. at 379. Shortly after this decision the DOI did in fact administratively acknowledge the Passamaquoddy and Penobscot Tribes of Maine for *all* purposes. *See also* John M. Paterson & David Roseman, *A Reexamination of Passamaquoddy v. Morton*, 31 ME. L. REV. 114 (1979); PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND *passim* (1985).

which branch of government has "primary jurisdiction" to decide the issue of tribal existence? The examination of this question necessarily entails examination of two tangentially related issues; namely, the notion of exhaustion of administrative process before a judicial determination or review, and whether or not the acknowledgment of Indian tribes is a nonjusticiable "political question" properly left to the political branches.

Though federal agencies and federal courts will often have concurrent jurisdiction over an issue, one or the other forum is usually better suited to settle questions of fact first. Kenneth Davis, in his characteristically clear style, notes that "primary jurisdiction is a doctrine of common law, wholly court-made, that is designed to guide a court in determining whether and when the court should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented."[65] Elsewhere Davis adds that "the doctrine of primary jurisdiction normally allocates power to make initial determinations, not final determinations; it normally governs when a court may act, not whether it may."[66] As regards the federal acknowledgment of Indian tribes, the issue of primary jurisdiction can be divided into three categories corresponding to different time frames: (1) before the publication of the proposed rules in 25 C.F.R. § 83, i.e., before 1977; (2) during the process of promulgating the regulations at 25 C.F.R. § 83, i.e., from 1977 to late 1978; and (3) after publication of the final rule and establishment of the BIA office in late 1978, i.e., from 1978 to the present.

Those cases involving the issue of federal acknowledgment of unacknowledged Indian groups presented to the courts before 1977 said little about primary jurisdiction or deference to the Secretary of the Interior. In most, if not all, of these cases[67] there was a presumption

65. 4 DAVIS, *supra* note 48, § 22:1, at 81.

66. *Id.* § 12:11, at 119. In unusually terse language, the United States Supreme Court provides a similar definition, in United States v. Western Pacific Railroad, 352 U.S. 59 (1956). The decision states:

> "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64.

67. *See supra* note 12. The more interesting cases were those in lower federal courts decided just prior to the promulgation of 25 C.F.R. § 83. The presumption was still evident, but the issues surrounding federal acknowledgment of unacknowledged Indian groups were more narrowly focused. *See also* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir.), *aff'g*, 388 F. Supp. 649 (D. Me. 1975); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (*Washington I*); Narragansett Tribe v. Southern Rhode Island Land Dev. Co., 418 F. Supp. 798 (D.R.I. 1976).

maintained by the courts that federal acknowledgment — then usually termed "recognition" — was generally within the bailiwick of the Secretary who had authority to recognize these tribes. However, there was not yet a uniform, systematic procedure to determine tribal status within the DOI, which typically turned on issues of adjudicative fact. Thus, the courts were a logical alternative to the DOI to decide such issues of fact. When challenges were made to tribal status by the Secretary as in *Holliday*,[68] the courts normally deferred to the DOI's position.[69] When the question of tribal status of unacknowledged Indian groups arose, as in the *Washington* cases,[70] the courts did not hesitate to adjudicate the issue. In the absence of a uniform administrative process for determining tribal status, primary jurisdiction was essentially a non-issue.

Litigation posed some interesting problems for the court in which federal acknowledgment or tribal status was an issue during the liminal stage of transition in 1977 to 1978 between no procedure and 25 C.F.R. § 83. Most indicative are the arguments found in *Mashpee Tribe v. New Seabury Corp.*[71] Plaintiff Mashpee Tribe had, in a 1977 pretrial motion to *Mashpee Tribe v. Town of Mashpee*,[72] moved for a continuance "upon learning that the Department [of the Interior], in a departure from previous policy, had issued proposed regulations for determining whether to recognize tribes and that, using these regulations, the Department would begin proceedings concerning the Mashpees."[73] This motion was denied by the district court, and this denial was affirmed by the First Circuit. Following a lengthy discussion of the primary jurisdiction doctrine, the reasons for affirming the denial of this motion were that the DOI "does not yet have prescribed procedures," alluding to the proposal status of the regulations at 25 C.F.R. § 83. Moveover, because of the "strong public interest in the prompt resolution" of the case, the court must decide since the DOI's "decision will not be available soon."[74] By far the most significant statement of the First Circuit regarding this matter dealt exclusively with the issue of primary jurisdiction: "It follows from what we have said, of course, that in another case, once the Department has finally approved its regulations and developed special expertise through applying them, we might arrive at a different answer."[75]

68. 70 U.S. (3 Wall.) 407 (1865).
69. *Id.* at 419.
70. *See infra* notes 76-82 and accompanying text.
71. 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).
72. 447 F. Supp. 940 (D. Mass. 1978), *aff 'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).
73. *Mashpee*, 592 F.2d at 580.
74. *Id.* at 581.
75. *Id.*

One might logically think that subsequent to the point in time when the DOI "finally approved its regulations and developed special expertise," the issue of primary jurisdiction would have been settled, and the courts would automatically defer to the BIA (DOI) for the resolution of acknowledgment issues. Such has not proven to be the case. In the seven federal court cases since the promulgation of 25 C.F.R. § 83 and establishment of the BIA's Branch of Acknowledgment and Research,[76] the district courts and appellate courts alike have differed in their approaches to the primary jurisdiction issue. Taking the major cases in chronological order, the first, and most entirely anomalous case, is the third in the series of *United States v. Washington*[77] cases. There, five unacknowledged "intervenor" groups (Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom) sought a judicial federal acknowledgment for purposes of participating in the court's ruling several years earlier in *Washington I*, which entitled federally acknowledged tribes to half the commercial fish catch in the waters of the Pacific Northwest.[78] *Washington III* was heard by Judge Boldt (who also decided *Washington I*) in early 1979, subsequent to the establishment of the BIA's acknowledgment office and 25 C.F.R. § 83, and all five intervenors had petitions for federal acknowledgment pending at the DOI.[79] Notwithstanding these facts, neither the parties nor the court mentioned the administrative process in the reported decision. This oddity was superseded by an even greater one. The court's "Finding of Fact #6" averred that "Neither Congress nor the Executive Branch has prescribed any standardized definition for either the term 'Indian' or 'Indian tribe' in terms of the special federal

76. In September 1978 the BIA created the Federal Acknowledgment Project within the Division of Tribal Government Services. The project's sole function was to evaluate petitions for federal acknowledgment from unacknowledged Indian groups. In 1981 the Project officially became a branch within the Division and was renamed the Branch of Federal Acknowledgment. In 1984 it merged with the old Branch of Tribal Services, used to determine beneficiaries of Indian Claims Commission awards, and both became the Branch of Acknowledgment and Research. The Branch is currently staffed by three ethnohistorians, two cultural anthropologists, two certified "Indian Lineage Specialist" genealogists, plus support personnel and a chief. Having evaluated 24 petitions, the Branch's scholars have developed considerable expertise, unlikely to be matched in any judicial proceeding either by jurists or outside expert witnesses.

77. 476 F. Supp. 1101 (W.D. Wash. 1979) (*Washington III*).

78. United States v. Washington, 520 F.2d 676, 683 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (*Washington I*).

79. The dates of the initial filing of these petitions for federal acknowledgment at the DOI by the unacknowledged intervenor groups are: Steilacoom, Sept. 28, 1973; Snohomish, Mar. 3, 1975; Samish, June 13, 1975; Snoqualmie, Feb. 5, 1976; and Duwamish, June 7, 1977. The petitions of the Samish and Snohomish were later denied by the DOI. The others have yet to be evaluated due to both backlogs and lack of sufficient data.

relationships with Indians."[80] Even though none of the parties raised the issue of primary jurisdiction, presumably the court could have asserted a *sua sponte* deference to the DOI in light of the fact that all intervenors were also all petitioners for federal acknowledgment. Instead, the court ruled that none of the intervenors was a "treaty tribe in the political sense."[81] Though it may be argued that what the intervenors sought was a limited judicial acknowledgment for "some purposes," it must be kept in mind that federal acknowledgment under 25 C.F.R. § 83 is for all purposes and, thus, would have secured the disputed fishing rights for the successful petitioners.

The Ninth Circuit Court of Appeals affirmed the "third" *United States v. Washington* in the fourth[82] of that series of cases, again with no mention of the issue of primary jurisdiction or 25 C.F.R. § 83. The conclusion that the Ninth Circuit is a world unto itself as regards the determination of tribal existence and the concomitant issue of primary jurisdiction may be somewhat modified by its exercise of self-restraint in *Price v. Hawaii*.[83] In *Price* the court stated that "[i]n the absence of explicit governing statues or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence."[84] Yet this deferential treatment of the political branches was preceded by a sentence in which the court, in evaluating the eligibility of the Native Hawaiian Hous, stated that "[U]nder both the BIA's current regulations for determining eligibility for federal benefits and 'privileges and immunities,'[85] and the BIA's pre-regulation standard for recognizing a tribe, the Hou fail to demonstrate eligibility for recognition."[86] Still, it is not entirely clear, given these facially conflicting assertions, whether the Ninth Circuit was deferring to the executive under the doctrine of primary jurisdiction or whether it was making its own — negative — determination of tribal existence.

The eastern federal courts appear less equivocal in their consistent deference to the executive branch through application of the primary jurisdiction doctrine. In *Cherokee Indians v. United States*[87] the issue

80. *Washington III*, 476 F. Supp. at 1103 (Finding of Fact #6). This finding is wholly irreconcilable with the definitions in 25 C.F.R. §§ 83.1(f), 83.7(a)-(g) (1991), created *precisely* to provide a "standardized definition" for Indian tribe "in terms of the federal relationships with Indians."

81. *Washington III*, 476 F. Supp. at 1111.

82. 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

83. 764 F.2d 623 (9th Cir. 1985), *cert. denied sub nom.* Duwamish, Samish, Snohomish, Snoqualmie & Steilacoom Indian Tribes v. Washington, 474 U.S. 1055 (1986).

84. *Id.* The court also correctly asserted that the administrative process in 25 C.F.R. § 83 was inapplicable to the Hou under 25 C.F.R. § 83.3(a) (1991), which limits the scope of the regulations to American Indians indigenous to the continental United States.

85. 25 C.F.R. § 83.7 (1991).

86. *Price*, 764 F.2d at 628.

87. Civ. No. 83-111-R (M.D.N.C. 1986). "Under the Indian Commerce Clause of

of determining tribal status was left to the political branches. The strongest and most recent statement on the issue was made by the District of Columbia Court of Appeals in the 1987 case of *James v. DHS*:[88]

> [D]etermination whether these documents adequately support the conclusion that the Gay Heads [Wampanoag] were federally recognized in the middle of the nineteenth century, or whether other factors support federal recognition, should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.[89]

Though some federal district and appeals courts appear to have been reluctant to dispossess themselves of the option to determine tribal existence of unacknowledged Indian groups subsequent to 1979, the above declaration of the District of Columbia Court of Appeals generally comports with the commentators following this specific issue.[90]

Finally, there are two pending cases in the federal district courts for Arizona and Connecticut directly addressing the issue of primary jurisdiction concerning the determination of tribal existence. Each

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the United States Constitution, Congress is recognized as the branch of government which is to determine tribal status for legal and practical purposes." COHEN, *supra* note 24, at 3. Both the United States and the State of North Carolina have carefully promulgated administrative procedures through which groups can seek official tribal recognition. *See* 25 C.F.R. § 83 (1991); 1 N.C. ADMIN. CODE tit. 1, §§ 15.0207-.0214.

88. 824 F.2d 1132 (D.C. Cir. 1987).

89. *Id.* at 1137. Interestingly, the pocket part (the 1988 supplement) to 25 U.S.C.A. cites *James* under §§ 2, 9. Keynote 4 in *James*, 824 F.2d at 1132, also cites 25 U.S.C.A. §§ 2, 9. *See* 25 U.S.C.A. § 2 (West Supp. 1988) (Duties of Commissioner, Notes of Decisions, Tribal recognition 19a); *id.* § 9 (Regulations by President, Notes of Decisions, Tribal Recognition 11a) ("Executive branch, and not judicial branch, must make initial determination as to recognition of Indian tribe.").

90. *See* Weatherhead, *supra* note 37, at 20 ("More appropriate in these circumstances is . . . that the doctrine of primary jurisdiction should apply to give Interior the first opportunity to apply its expertise to the questions presented, subject to judicial review."); Note, *The Unilateral Termination of Tribal Status:* Mashpee Tribe v. New Seabury Corp., 31 ME. L. REV. 153, 156 n.12.1 (1979) ("The determination of tribal existence under the regulations contained in 25 C.F.R. § 54 [now § 83] would appear to qualify the Department of the Interior for primary administrative jurisdiction in administering the acknowledgment program . . . .").

decision appears to take a different stance on the issue. In *Sekaquaptewa v. MacDonald*,[91] the District Court of Arizona issued an order following the BIA's positive recommendation that the federal government acknowledge the intervenor San Juan Southern Paiute as a tribe. The order allowed intervention but withheld determination "concerning whether the intervenor is a 'tribe,'" essentially postponing the decision. The court stated the "issue was to be determined at the conclusion of trial or at such earlier time as the Court deems appropriate."[92] It is reasonable to assume that the judge was merely waiting for the BIA's final determination regarding federal acknowledgment of the San Juan Southern Paiutes. The judge may have hoped to base his own decision on the BIA's determination. If so he could as easily have so stated in his order without leaving the impression that it is rightfully the court's decision and not the DOI's.

This ambiguity does not exist in the court's ruling on a motion to stay the proceedings pending the BIA's determination of tribal existence made by counsel for the Mohegans in *Mohegan Tribe v. Connecticut*.[93] Granting the motion, which was opposed by the state, the court stayed the proceedings until the Mohegan's petition for federal acknowledgment was evaluated by the BIA and a decision was rendered. The court reasoned that "[i]f the Bureau recognizes the Mohegans as a tribe, a central and troublesome issue in this action will have been *conclusively* determined, and settlement negotiations may be encouraged thereby."[94] The difference in judicial attitudes between the federal courts of the Ninth Circuit and the First and Second Circuits (or eastern districts in general) concerning primary jurisdiction to determine the issue of federal acknowledgment of unacknowledged Indian groups may be because so little litigation in Indian law is heard in eastern courts. Conversely, in the West, the normal docket has at least one Indian law case at any given time. Until the United States Supreme Court hears a case on this issue and makes a definitive ruling as to primary jurisdiction to determine tribal existence, this variation in judicial attitudes among the lower courts is likely to persist.

Related closely to the central and principal issue of primary jurisdiction — which is central and principal within the framework of this

91. Civ. No. 74-842 PHX EHC (D. Ariz. filed Dec. 30, 1974) (Order of Apr. 29, 1988).

92. *Id.*

93. Civ. No. H-77-434 MJB (D. Conn. filed Aug. 31, 1977). The case is still pending; it should be noted that there are two reported decisions styled *Mohegan Tribe v. Connecticut*. *See* Mohegan Tribe v. Connecticut, 483 F. Supp. 597 (D. Conn.), *aff'd*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); Mohegan Tribe v. Connecticut, 528 F. Supp. 1359 (D. Conn. 1982). These cases concern an interlocutory appeal from the district court's denial of the state's motion to dismiss.

94. Mohegan Tribe v. Connecticut, No. Civ. H-77-434 MJB (D. Conn., filed Aug. 31, 1977) (Order of Nov. 8, 1984) (emphasis added).

investigation for the purely pragmatic reason that the courts are most often confronted with it — is the bipartite issue of "exclusive jurisdiction" and the "political question." As between the two parts of this issue the political question is more complex: The political question issue can be further subdivided into (1) original jurisdiction and (2) reviewability.

"An agency often has *exclusive* jurisdiction," writes Kenneth Davis, "which is something more than primary jurisdiction. Agencies typically have exclusive jurisdiction to resolve issues of fact, subject to limited review."[95] Exclusive jurisdiction is sometimes expressly granted in enabling legislation establishing administrative processes. Clearly, there is no jurisdiction of this type relative to the federal acknowledgment of Indian tribes by the Secretary of the Interior or BIA officials. More typically, however, exclusive jurisdiction is inferred due to absolute control of the subject matter by one agency or the degree of technical expertise not otherwise available to the federal government's other branches. Although the BIA can be said to regulate Indian affairs almost exclusively, there are still other large federal agencies, notably the IHS and the Administration for Native Americans within the Department of Health and Human Services, that exercise sufficient control to preclude the BIA's claim of exclusive regulation of Indian affairs. With regard to the technical expertise of the BIA in general, no serious claim can be made that management of Indian affairs requires a degree of expertise beyond the competence of the courts or certain other agencies. Indeed, even with an area as recondite as the ethnohistory and anthropology of tribal existence, dealing as ethnohistory and anthropology do with such diaphanous terms as community, tribe, acculturation, and cohesion, the *Mashpee* court observed that "[t]he facts in this case, though developed and interpreted in part with the expert help of historians and anthropologists, are not so technical as to be beyond the understanding of judges or juries."[96] Thus, under none of the above criteria could the BIA reasonably be said to have *exclusive* jurisdiction over Indian affairs generally or over the determination of tribal existence and federal acknowledgment specifically.

Both federal court judges in their decisions and legal commentators in articles and books have written extensively on the concept of the

95. 4 DAVIS, *supra* note 48, § 22:1, at 84.

96. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581 (1st Cir. 1979). *But see* Note, *supra* note 90, at 155 n.12.1 ("Competency to decide tribal existence may rest *exclusively* with the executive branch under the acknowledgment regulations, due to its superior information and expertise and the statutory grants of authority to the President and the Secretary of the Interior to manage 'all matters arising out of Indian relations.'") (emphasis added).

nonjusticiable political question.[97] Examination of this doctrine herein is on the considerably narrower issue of whether judicial determination of tribal existence is a political question. Specifically, the bipartite issue is (1) whether the federal judiciary has the original jurisdiction to create a semi-sovereign entity by deciding an Indian group is a tribe for certain or all purposes, effectively conferring federal acknowledgment; and (2) whether, once the Congress or the DOI has so acknowledged an Indian group, the federal courts may either review or strike down such congressional or executive acknowledgment.

The first part of the issue entails the doctrine of primary jurisdiction which determines *when* — not whether — a federal court may preempt agency prerogative to decide the issue of tribal existence. Assuming the agency does not have exclusive jurisdiction, the presumption is that a court may intercede in the agency's procedure, if warranted, at the court's discretion. The chief issue in this part of the political doctrine question is essentially the reverse: whether — not when — a federal court has jurisdiction to determine tribal existence. The simple answer is, probably yes. The landmark case of *Baker v. Carr*[98] addressed this point directly. The Court alluded to its usual "deference to the political departments in determining whether Indians are recognized as a tribe,"[99] citing *Holliday*. The Court stated that this issue reflected "familiar attributes of political questions," but added (in what should be the epitaph of Indian law once deceased) that it also has "a unique element" and therefore concluded that there is "no blanket rule."[100]

The precise issue of whether a federal court has jurisdiction to determine the existence of a tribe was squarely addressed in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*.[101] The court rejected Maine's intervenor argument that the court lacked jurisdiction because the case presented a nonjusticiable political question. The decisions the state cited as authority for its argument dealt "solely with the *power* of Congress to legislate with respect to Indians."[102]

97. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 71-79 (1978); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Christopher A. Johnson & Thomas B. McAffee, Note, *A Dialogue on the Political Question Doctrine*, 3 UTAH L. REV. 523 (1978); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). The case law is too extensive to cite generally.

98. 369 U.S. 186 (1962).

99. *Id.* at 215-16.

100. *Id.*

101. 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

102. *Id.* at 664. The political question doctrine is most commonly couched in terms of *Congress'* power in relation to the separation of powers. Yet it can and does apply to administrative executive prerogative and authority as well, whether *sui generis* or delegated, and is used here in both the congressional and executive sense.

"It is clear," the court concluded, "that this case presents no nonjusticiable political question."[103] It would appear, then, that following the rules set forth in *Baker* and *Passamaquoddy*, federal courts may resolve a dispute over or otherwise determine for certain purposes the issue of tribal existence of an unacknowledged Indian group where the political branches have not yet made such determination. In other words, such a judicial determination is not a nonjusticiable political question.

Once the political branches have spoken, however, and federally acknowledged an Indian tribe, the situation changes. This circumstance invokes the traditional "Indian political question," the second part of the bipartite issue. The issue is framed as whether, once Congress or the DOI has acknowledged a tribe, the federal courts may review or strike down such acknowledgment.[104] The simple answer is probably no. The commentators and the case law agree this preclusion of the judiciary to review or strike down a prior congressional or executive acknowledgment is provisional. The proviso stems from the Court's ruling in the seminal case of *Sandoval*,[105] where the Court held that however plenary the power of Congress may be over Indian affairs, and however much of that power is delegated to the executive for the purpose of acknowledging Indian tribes, "Congress may [not] bring a community or body of people within the range of this power by

103. *Id. But see* United States v. Washington, 476 F. Supp. 1101, 1110-11 (W.D. Wash. 1979) (*Washington III*) ("[T]he determination of what [tribal] entities may exercise political control over communal rights secured by treaties with respect to the taking of fish and other wildlife is a political question requiring determination or concurrence by the political authorities of the United States."); *cf.* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-85 (1976).

104. The bulk of commentary about the Indian political question doctrine concerns this aspect of it. For example, Felix Cohen states that

> [w]hen Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination. Some older cases have characterized such determinations as political questions, outside the scope of judicial review. . . . For most current purposes, judicial deference to findings of tribal existence is still mandated by the extensive nature of congressional power in the field.

COHEN, *supra* note 24, at 3; *cf.* Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 64 (1979) ("When, however, Congress or the Secretary, acting pursuant to congressional authorization, has formally recognized an aggregation of Indians as a tribe, the issue of tribal existence becomes a political question. . . Thus, the courts will neither review the tribal status of a federally recognized tribe nor disturb the prior recognition of a tribe by the federal government."); *see also* Weatherhead, *supra* note 37, at 8; Tureen, *Federal Recognition and the "Passamaquoddy" Decision*, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, TASK FORCE #10 (FINAL REPORT, AIPRC) at 1671 (1979).

105. United States v. Sandoval, 231 U.S. 28 (1913).

arbitrarily calling them an Indian tribe. . . ."[106] This proscription, combined with later rulings that use of Congress plenary power over Indian affairs must be rationally related to purposes of the government-to-government relationship,[107] effectively limits this plenary power. Thus, as the Court held in *Baker*, normally and as a practical matter the courts will defer to and not interfere with a political branch's prior acknowledgment owing to the issue's status as a nonjusticiable political question, except when such acknowledgment is arbitrary: "Able to discern what is 'distinctly Indian' . . . the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."[108] Because the matter has never been tried before, it is not clear whether a federal court could properly overturn a BIA decision made under 25 C.F.R. § 83 concerning the acknowledgment of an Indian group if the court found malfeasance or misfeasance in the administrative procedure to be "arbitrary and capricious." It is not clear whether this judicial trespass into the "political" arena would violate the nonjusticiable political question doctrine as described above.[109]

106. *Id.* at 46.

107. *See* Morton v. Mancari, 417 U.S. 535 (1974); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); *see also* United States v. Sioux Nation, 448 U.S. 371 (1980).

108. Baker v. Carr, 369 U.S. 186, 217 (1961). To borrow some succinct phraseology from Allogan Slagle, "Federal acknowledgment does not 'create' a tribe where none existed." Allogan Slagle, *A Byline of Warning Barks*, NEWS FROM NATIVE CAL. (Berkeley, Cal.), July/August 1987, at 19 (vol. 1, no. 3).

109. This is an intriguing question, which must be left to future study. This study should examine the issues of administrative adjudication and judicial review of such determinations in the context of 25 C.F.R. § 83, with all that this entails, e.g., use of discretion, consistency of standards and decisions, role of staff, and implications for decision makers under the Federal Tort Claims Act, ch. 646, 62 Stat. 869 (1948). More intriguing still, is the effect of judicial reversal of a BIA acknowledgment upon the United States' relationship with the tribe or, conversely, the similar effect upon an Indian group previously denied acknowledgment by a federal court but subsequently acknowledged by the BIA. This last question is asked, but not answered, in a student note on *Mashpee*:

> One consequence of failing to defer adjudication on the Mashpees' tribal existence is the possibility of reopening the judgment in a suit by the United States as trustee of the tribe under [the Indian Reorganization Act]. The United States is not bound by the judgment in *Mashpee* . . ., and the Department of the Interior may yet acknowledge the tribe's existence upon determination of the Mashpee Wampanoag Tribe's petition for acknowledgment.

Note, *supra* note 90, at 156. Whether the DOI's decision is binding upon federal courts, or a federal court decision is binding upon the DOI vis-a-vis federal acknowledgment of a tribe, and whether the doctrines of res judicata and collateral estoppel are applicable, are all unsettled issues. Such clashes may yet appear as regards the federal acknowledgment of the Duwamish, Steilacoom, Snoqualmie, Mashpee Wampanoag, and San Juan Southern Paiutes.

It is perhaps fitting to end this discussion with an examination of the doctrine of exhaustion. That doctrine requires exhaustion of all available or remaining internal agency rebuttal or review procedures before seeking relief in federal court. Of course exhaustion presupposes that, in light of the nonjusticiable political question, judicial review is available at least for adverse BIA decisions regarding the federal acknowledgment of an Indian tribe. Operating on the assumption that such review is available under chapter 7 of the Administrative Procedure Act (APA),[110] the central questions regarding exhaustion become, similar to the doctrine of primary jurisdiction,[111] when or at what point during the administrative proceeding the federal courts may undertake to adjudicate an agency/client dispute. One might also ask whether the courts can interpose at all because of a statutory or regulatory exhaustion requirement.

The general theory within the judicial system is that courts of appeal only review final action of the lower courts and not interlocutory action. As a general theory the same principle applies to administrative agencies' decisions. In federal courts difficult and controlling questions of law may be reviewed by higher courts as interlocutory decisions, but this review is strictly governed by 28 U.S.C. § 1292. However, as Kenneth Davis points out, "No comparable provision governs review of administrative action."[112] What does govern the exhaustion doctrine regarding administrative action is basically the *adequacy* of the internal agency review process, determined on an ad hoc or case-by-case basis using an unwritten objective "reasonable and prudent" standard.[113] The APA does provide some guidance, stating that "Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in court are subject to judicial review."[114]

110. 5 U.S.C. §§ 702, 704 (1988).

111. Exhaustion is not exactly the obverse of primary jurisdiction but is closely related. The former governs judicial jurisdiction *during* the administrative process and anticipates intervening in that process; the latter governs original jurisdiction *before* the administrative process has begun and anticipates preempting that process. The decision in a Connecticut case spells out the distinction with clarity. *See* Sharkey v. Stamford, 492 A.2d 171 (Conn. 1985).

112. 4 DAVIS, *supra* note 48, § 26:10, at 455-56.

113. *Id.*

114. 5 U.S.C. § 704 (1988) (emphasis added). What is relevant here is the wording in the APA:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, *unless the agency otherwise requires by rule and provides that the action is meanwhile inoperative*, for an appeal to superior agency authority.

Id. (emphasis added). Compare the emphasized wording with the language in 25 C.F.R.

However, Davis adds that "(1) the term 'final' is variously interpreted and (2) the courts often ignore the statute."[115] Because 25 C.F.R. § 83.10(a) both requires and defines finality pursuant to the APA in acknowledgment decisions, it seems clear — "seems" because the total lack of consistency in federal court decisions on the exhaustion issue will not allow an unequivocal term — that exhaustion of DOI rebuttal and review procedures is required in the event of a challenge to such a decision.

The *controlling* federal court cases agree. In *Coyote Band of Pomo Indians v. United States*[116] the court simply stated, "The APA requires exhaustion of administrative remedies prior to judicial review."[117] More recently, the District of Columbia Court of Appeals in *James* addressed the exhaustion issue directly as it relates to the DOI's federal acknowledgment decisions:

> Further, requiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the area of tribal recognition. The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition, *see* 25 C.F.R. § 83.6(b) . . . It is apparent that the agency should be given the opportunity to apply its expertise prior to judicial involvement.[118]

Therefore, despite the various exceptions to the exhaustion doctrine, and consistent with the dictates of the 5 U.S.C. § 704 and the *James* decision, it seems a virtually incontrovertible conclusion that parties challenging an adverse decision by the Secretary of the Interior con-

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§ 83.10(a):

> The Assistant Secretary's decision shall be final for the Department unless the Secretary requests him to reconsider within 60 days of such publication. If the Secretary recommends reconsideration, the Assistant Secretary shall consult with the Secretary, review his initial determination, and issue a reconsidered decision within 60 days which shall be final and effective upon publication.

25 C.F.R. § 83.10(a) (1991).

115. 4 DAVIS, *supra* note 48, § 26:10, at 456.

116. 639 F. Supp. 165 (E.D. Cal. 1986).

117. *Id.* at 168 n.5. As authority for this assertion, the court cited 5 U.S.C. § 704 and Lloyd C. Lockrem, Inc. v. United States, 609 F.2d 940 (9th Cir. 1979). For an enumeration of primary purposes of the exhaustion doctrine, see, e.g., Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984). For a statement of some exceptions to the doctrine, of which there are several, see SCHWARTZ, *supra* note 48, at 733.

118. James v. DHS, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

cerning the federal acknowledgment of an Indian tribe under 25 C.F.R. § 83 must exhaust the administrative rebuttal and appeal process before haling the Secretary, the DOI, or the BIA into federal court.

IV. Conclusion

No one seriously doubts that the President or his Secretary of State has the authority, or even the exclusive jurisdiction, to recognize the new government of a foreign nation. Similarly, few would doubt that such recognition is a nonjusticiable political question in which the federal courts have no jurisdiction. Had Justice Thompson not been in the minority in *Cherokee Nation*, concluding that "[t]esting the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state,"[119] it may be that today the Department of State, rather that the Department of the Interior, would be federally acknowledging Indian tribes. But the writhes of history produced a different fate for the Cherokee Nation, and by extension for all other Indian tribes as well, when the majority's opinion by Chief Justice Marshall announced that they were "domestic dependent nations" whose relationship to the United States "resembles that of a ward to his guardian."[120] And so the anomalous and ambiguous corpus of federal Indian law had its effective beginning, reflecting the anomalous and ambiguous status of Indian tribes and Indian groups within the United States.

One belated step toward the amelioration of this general ambiguity was the promulgation of 25 C.F.R. § 83 in 1978. These regulations have not as yet settled conclusively all the problems attendant to the determination of tribal existence. However, these regulations have gradually brought some needed order and clarification to a once wholly confused area. Moreover, time will doubtless establish both 25 C.F.R. § 83 and the acknowledgment office at the BIA as permanent forces in terms of dispositive action regarding the federal acknowledgment of Indian tribes. The existence of the regulations and the acknowledgment office, with its record of twenty-four acknowledgment decisions, has added to the Secretary of Interior's arsenal with which he can defend, or justify, his authority to acknowledge tribes.

The trend of federal courts since 1978, in addition to the explicit pronouncement in *James*, has nearly established an automatic deference to the primary jurisdiction of the BIA when the issue of tribal existence comes before a federal court. Closely related to the primary jurisdiction

119. Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1, 52 (1831) (Thompson, J., dissenting).

120. *Id.* at 16.

issue, assuming an adverse BIA decision under 25 C.F.R. § 83 is reviewable under the APA, the regulations provide for final action by the Secretary and exhaustion of administrative review procedure before relief is sought in federal court. Whatever may be the problems associated with delays and slowness of the petition evaluation process under 25 C.F.R. § 83, which were not within the scope of this comment, the positive legal effects described throughout would appear to outweigh them.